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No. 95 1028

In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
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UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FADEM AND MARY O. FADEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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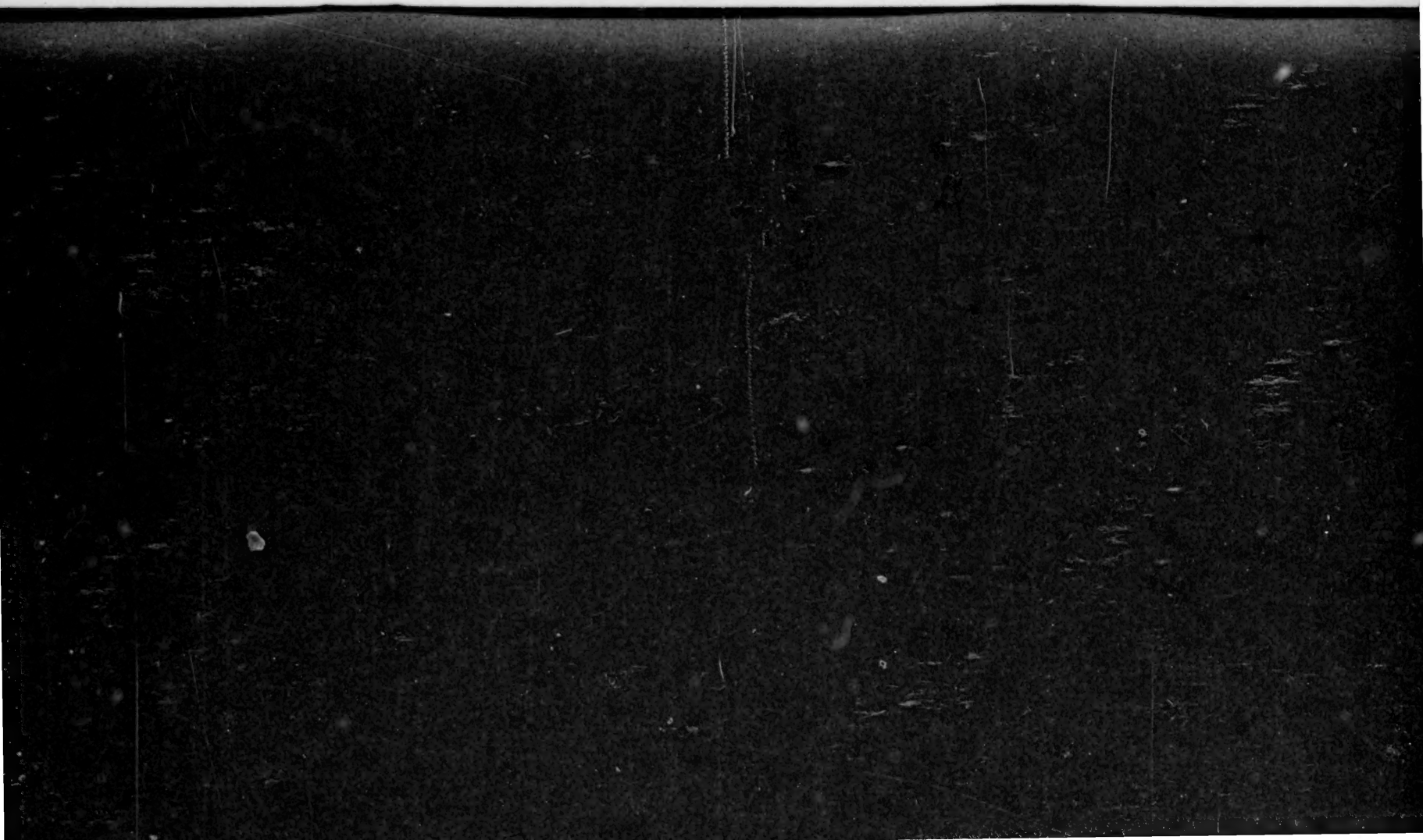

QUESTION PRESENTED

Whether the 12-year statute of limitations applicable to actions against the United States brought under the Quiet Title Act, 28 U.S.C. 2409a(g), is subject to equitable tolling.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The oral opinion and orders of the district court (App., *infra*, 30a-49a) are unreported. The original opinion of the court of appeals relating to appellate jurisdiction (App., *infra*, 25a-29a) is unpublished, but the decision is noted at 29 F.3d 631 (Table). A subsequent opinion of the court of appeals relating to appellate jurisdiction, issued on rehearing (App.,

infra, 16a-24a), is reported at 42 F.3d 533. The opinion of the court of appeals on the statute of limitations issue (App., *infra*, 1a-12a), which is the subject of this petition, is reported at 52 F.3d 202. An opinion of the court of appeals affirming the district court's dismissal of companion cases (App., *infra*, 13a-15a) is unpublished, but the decision is noted at 51 F.3d 280 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1995. A petition for rehearing was denied on July 26, 1995. App., *infra*, 50a. On October 16, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 23, 1995. On November 14, 1995, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including December 23, 1995 (the Saturday before Christmas Day, a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2409a(g) of Title 28, United States Code, provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

STATEMENT

1. This case arises out of a longstanding boundary dispute between respondents and the United States. Respondents own several parcels of high desert land in eastern San Diego County, California. One parcel of their land lies directly to the west of government land managed by the Bureau of Land Management (BLM). App., *infra*, 2a. The dispute concerns a strip of property, about 500 feet wide, where respondents' land and the government's land abut. Respondents claim that they have always believed that the disputed strip was part of their land. In particular, they contend that, when they first acquired an interest in their property in 1956, they believed that the eastern boundary line of their property was marked by a redwood post. App., *infra*, 2a-3a; C.A. E.R. 58-59.

Events that took place during the 1960s are inconsistent with respondents' claim. First, in 1963, respondents applied to BLM for permission to build a reservoir on the disputed strip of territory, approximately 300 feet west of the redwood post. App., *infra*, 3a. It is uncontested that, if the reservoir had been located on respondents' property, there would have been no need for them to apply for a BLM permit. Second, around 1965, BLM constructed an extension of an existing road, such that the extension crossed the disputed strip of property. *Id.* at 4a-5a. That extension would have put respondents on notice that the government claimed at least some interest in a part of the disputed property.

Respondents contend, however, that they were misled about the government's claim to or interest in the disputed land by comments allegedly made to them by Virgil Bottini, who was the area manager of BLM

between 1956 and 1965, and who is now deceased. According to respondents, Bottini told them "that BLM did not know exactly where the [survey] section line boundaries were on the ground and that the BLM would have the boundaries surveyed to resolve the matter." C.A. E.R. 60. Respondents also allege that Bottini relied on what turned out to be an erroneous survey map to point out the approximate boundary, and that, by doing so, Bottini led them into believing that the government recognized their claim to the disputed strip. *Ibid.*

The matter came to a head after 1968, when the permit for respondents' reservoir expired. BLM then concluded that the proper way of dealing with the reservoir was not through a BLM permit but through a grant of a right-of-way from BLM to respondents. See C.A. E.R. 116. Respondents, however, maintained that they owned the property around the reservoir in fee, and they refused to apply for a right-of-way from BLM. In light of the dispute, the Department of the Interior decided to conduct a new survey of the contested area. The new survey was completed in 1970, but was not approved by BLM until 1980. The new survey demonstrates that the true boundary line is approximately 500 feet west of the redwood post, and also 200 feet west of the reservoir. App., *infra*, 3a-4a.

Respondents maintain that they learned of the results of the new survey only in 1983, when they discovered that BLM employees were removing culverts from the area around the reservoir. In the 1980s, they filed several lawsuits against the government, including this one, filed in 1988, seeking to quiet title to the disputed property under the Quiet

Title Act (QTA), 28 U.S.C. 2409a.[1] The United States moved to dismiss the QTA suit, invoking the QTA's statute of limitations, which provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. 2409a(g).

The district court agreed with the United States that respondents' quiet-title action is time-barred. It concluded that respondents knew that the government claimed some interest in the disputed property by 1963 at the latest, for they filed the permit application for the reservoir at that time. App., *infra*, 40a. Thus, the court held, the claim had become time-barred by 1975 at the latest. *Id.* at 41a. The court rejected respondents' contention that statements by Bottini expressing uncertainty about the location of the boundary provided a basis for tolling the limitation period; at most, the court reasoned, those remarks might support respondents' claim on the merits, but they "do not amount to an official disclaimer by the United States of any interest in [respondents'] property." *Id.* at 41a. The district court also observed that the Ninth Circuit had

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[1] Section 2409a(a) provides, in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

"unequivocally stated that equitable estoppel or tolling cannot be used to circumvent the Quiet Title Act's 12 year statute of limitations," *id.* at 42a (citing *McIntyre* v. *United States*, 789 F.2d 1408 (9th Cir. 1986)), which it referred to as "a jurisdictional requirement," App., *infra*, 42a.[2]

2. The court of appeals reversed and remanded. App., *infra*, 1a-12a. The court of appeals concluded, contrary to the district court, that "the doctrine of equitable tolling applies to the QTA." *Id.* at 2a.

The court of appeals acknowledged that, in *McIntyre*, it had held that the statute of limitations in the QTA is "jurisdictional" and therefore is not subject to equitable tolling or estoppel. But, the court concluded, that ruling had been undermined by *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), in which this Court held the doctrine of equitable tolling applicable to the statute of limitations in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), in suits against the government. The court of appeals read *Irwin* to create "a general rule that equitable tolling [is] a defense to all federal statutes of limitations, unless Congress provided otherwise." App., *infra*, 6a-7a.

The court of appeals rejected the United States' argument that equitable tolling of the QTA's statute of limitations is precluded by this Court's decisions in *Block* v. *North Dakota*, 461 U.S. 273 (1983), and *United States* v. *Mottaz*, 476 U.S. 834 (1986), in which

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[2] The district court also dismissed a separate claim by respondents for failure to join necessary and indispensable parties, the adjoining private landowners whose interests would be affected by resolution of the matter. App., *infra*, 42a. That ruling is not at issue here.

this Court considered the QTA's statute of limitations and characterized it as "jurisdictional." The court of appeals concluded that those statements in *Block* and *Mottaz* "have no continuing validity after" *Irwin*, which, in its view, "held that federal statutory time limitations on suits against the government are *not* jurisdictional in nature," at least as a presumptive matter. App., *infra*, 8a. The court also rejected the United States' arguments based on the legislative history of the QTA and the policy behind the generous 12-year limitation period. *Id.* at 8a-9a.

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the 12-year statute of limitations applicable to actions brought against the United States under the Quiet Title Act (QTA) is subject to equitable tolling. That issue is similar to the question involved in several recent decisions of the courts of appeals under the tax laws. The Ninth Circuit held recently that the doctrine of equitable tolling may be applied to enlarge the statutory provisions establishing the time within which a claim for a refund of income taxes may be filed and limiting the amount of any refund. See *Brockamp* v. *United States*, 67 F.3d 260 (9th Cir. Oct. 5, 1995); 26 U.S.C. 6511(a) (refund claim must be filed within three years after the filing of the return or two years after payment of the tax); 26 U.S.C. 6511(b) (limiting the amount of the refund to the amount of taxes paid within specified periods prior to the refund claim). That decision conflicts with the decisions of other courts of appeals, including a decision of the Fourth Circuit rendered just three days earlier. See *Webb* v. *United States*, 66 F.3d 691 (4th Cir. Oct. 2, 1995), rehearing denied (Nov. 28, 1995); *Oropallo* v.

United States, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994); *Vintilla* v. *United States*, 931 F.2d 1444 (11th Cir. 1991). The Solicitor General is currently considering whether to file a petition for a writ of certiorari in *Brockamp*, and has requested an extension of time, to and including February 2, 1996, within which to do so. A certiorari petition by the taxpayer in *Webb* would be due by February 26, 1996. Because the issue in this case is closely related to the tolling issue that has divided the courts of appeals and may be resolved by this Court under the tax laws, we suggest that the Court hold the petition in this case pending the filing and disposition of a petition for a writ of certiorari in *Brockamp* or *Webb*.

The reasoning relied on by *Webb*, in particular, for holding that the principle of equitable tolling may not enlarge the time for filing a refund claim is relevant to this case as well. In *Webb*, the Fourth Circuit concluded that equitable tolling does not apply to tax refund claims for two reasons. First, the Fourth Circuit noted that, in *Irwin* v. *Department of Veterans Affairs*, this Court reasoned that the principle of equitable tolling should be available in Title VII actions against the government largely because such tolling principles exist for similar suits against private defendants. The *Webb* court pointed out that, unlike tort actions or employment disputes, tax refund cases cannot be brought against private litigants, but can be brought only against the government. 66 F.3d at 697. Second, the Fourth Circuit concluded in *Webb* that, even if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail because that presumption is effectively rebutted by other aspects of the statutory scheme. *Id.* at 699.

Both of those reasons suggest that equitable tolling should also not be applicable to quiet title actions brought against the United States under the QTA. The QTA is the sole waiver of sovereign immunity that permits a party to bring the United States into court to force an adjudication of a title dispute involving land in which the United States claims an interest. See *Block* v. *North Dakota*, 461 U.S. at 275-276. The QTA does not, however, provide any mechanism for resolving disputes among private parties as to land ownership; unlike the statute at issue in *Irwin*, it has no application to defendants other than the United States. The situation is therefore not analogous to that of the federal cause of action in Title VII, considered by the Court in *Irwin*, which may be brought against private parties as well as the United States. See generally *Brown* v. *GSA*, 425 U.S. 820 (1976). Well before *Irwin*, this Court had held that the limitation period for bringing suit against a private employer under Title VII was not jurisdictional but rather was subject to equitable tolling, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and the Court concluded in *Irwin* that it would be anomalous to construe the identical provision as strictly jurisdictional when applied to the United States as a defendant, but not when applied to other defendants.

The QTA is, moreover, addressed to an important aspect of the sovereignty of the United States, the ownership of property. See U.S. Const. Art. IV, § 3, Cl. 2 (Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940) ("The power over the public land thus

entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'") (footnote omitted). The QTA provides "the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property." *Block* v. *North Dakota*, 461 U.S. at 276-277. Indeed, the QTA provides for quiet-title actions to be brought against the United States itself, and not against a federal officer. Such suits, like tax refund suits, implicate the core of sovereign immunity. See *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain"). The court of appeals' ruling in this case fails to respect the conditions that Congress has placed on its waiver of that immunity, and exposes the United States to stale claims concerning the vast holdings of public lands in the Ninth Circuit.

Second, as with the tax refund statutory scheme considered in *Webb*, *Brockamp*, and the other decisions cited above, the text of the QTA strongly suggests that Congress did not intend the statute of limitations to be subject to equitable tolling. The Court spoke in *Irwin* of a "rebuttable presumption" in favor of the availability of equitable tolling in federal causes of action, but it subsequently made clear that the courts may not apply the doctrine when to do so would be "fundamentally inconsistent" with other aspects of a statutory structure set in place by Congress. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991).

In the context of the QTA, equitable tolling is inconsistent with both the lengthy limitation period (12 years) and the statutory specification that that

period runs from the date on which the plaintiff knew or should have known of the government's claim. When Congress in 1972 considered waiving sovereign immunity to quiet title actions, the Executive Branch urged that the Act be applied prospectively only (*i.e.*, not to claims that might have accrued prior to enactment). See *Block* v. *North Dakota*, 461 U.S. at 283. Ultimately, Congress and the Executive Branch agreed to a relatively generous 12-year statute of limitations, but recognized that the 12-year period would foreclose the revival of stale claims, a major concern during the consideration of the QTA. Congress and the President concluded that the 12-year statute of limitations struck an appropriate balance between private parties' interests in the adjudication of title disputes against the United States and the government's need to avoid the serious disruption of federal programs that might be caused by lawsuits involving long-dormant land disputes. Nothing in the legislative history suggests that Congress intended that equitable tolling could be applied to extend still further this long limitation period. As one judge has observed, "[l]iberal estoppel and tolling, tacked onto a long period of limitations, is double counting." *Cange* v. *Stolter & Co.*, 826 F.2d 581, 599 (7th Cir. 1987) (Easterbrook, J., concurring).

It is also difficult to square equitable tolling with the fact that the QTA's statute of limitations provides that the cause of action accrues only when the plaintiff "knew or should have known" of the claim of the United States. Whereas some limitation periods run from the event giving rise to the cause of action, whether or not the plaintiff was aware of it (see, *e.g.*, *Lampf*, 501 U.S. at 361-362), that is not the case with the QTA. A plaintiff under the QTA is under an obli-

gation to file a lawsuit only once he or she actually knows of the government's claim, or reasonably should be aware of the facts giving rise to that claim. Allegations of misconduct by the government, such as concealment of material facts about the government's claim or misleading statements about the nature of that claim, might be relevant to determining when the plaintiff "knew or should have known of the claim of the United States." But those allegations should not provide a basis *also* for concluding that the limitation period is subject to tolling. If respondents' argument were accepted, then their allegations about misleading statements by Bottini apparently would both set the date on which the limitation period began, and also toll that limitation period.[3] Such a result would truly be "double counting."

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[3] Thus, in this case, the statements allegedly made by Bottini might be relevant to determining whether respondents should have known, at the time those statements were made, whether the United States claimed an interest in the disputed land. But those statements would not eliminate the force of other facts, such as respondents' application for the reservoir permit and the government's completion of a road across the property at issue. Rather, the court would have to consider all the facts in combination to determine whether respondents "should have known" at a particular time that the United States claimed an interest in the land.

CONCLUSION

The petition for a writ of certiorari should be held pending the possible filing of a petition for a writ of certiorari seeking review of the decision in either *Brockamp* v. *United States*, 67 F.3d 260 (9th Cir. 1995), or *Webb* v. *United States*, 66 F.3d 691 (4th Cir. 1995), and, if a petition is filed in one of those cases, the petition in this case should then be disposed of as appropriate in light of the Court's disposition of the petition in *Brockamp* or *Webb*.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56404
D.C. No. CV-88-00203-JSR

ROBERT FADEM; MARY O. FADEM,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Southern District of California

[Submitted March 10, 1994*
Pasadena, California]

[Memorandum filed June 22, 1994
Memorandum Withdrawn Oct. 20, 1994
Filed April 3, 1995]

Before: MYRON H. BRIGHT**, CHARLES WIGGINS and THOMAS G. NELSON, Circuit Judges.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

** Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

Robert and Mary Fadem (the Fadems) filed suit under the Quiet Title Act (QTA), 28 U.S.C. § 2409a, challenging the United States' claim to real property in San Diego County, California. They appeal the district court's dismissal of the case which held that the Fadems' claim was time-barred; equitable tolling does not apply to the QTA; and the Fadems had notice of the "contours" of the Government's claim. We reverse and remand, holding that the doctrine of equitable tolling applies to the QTA and that the "contours" doctrine is limited.[1] Thus, depending on the facts as determined by the district court on remand, the Fadems may have a viable claim under the QTA.

FACTS AND PROCEDURAL BACKGROUND

The Fadems are the owners of a large tract of high desert land in San Diego County, California. This land is located in Section 9 of Township 13 South, Range 7 East, San Bernardino Meridian. The United States owns property in Section 10 which is adjacent to and east of the Fadems' property. Thus, the boundary between the Fadems and the United States is the line between Sections 9 and 10, and its disputed location gave rise to this suit.

The Fadems allege they have always had a good faith belief the boundary between Sections 9 and 10

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[1] We previously held in *Fadem v. United States*, 42 F.3d 533, 535 (9th Cir.1994), that we had jurisdiction to hear the Fadems' appeal in this case and two other cases which were resolved in an unpublished disposition.

was marked by an accepted historical monument, a redwood post. However, the history of the property's use by the Fadems and by the Bureau of Land Management (BLM), which manages the United States' property, does not clearly support the Fadems' allegation. Two incidents occurring in the 1960s are significant in determining whether the Fadems had notice of the Government's claim; they include a dispute over a BLM permit for a reservoir and the BLM's construction of a road.

In 1963, the Fadems applied for a permit from the BLM for a reservoir. However, the reservoir was located approximately 300 feet west of the redwood post which the Fadems allege marked the eastern boundary of their property. If the Fadems indeed own all the property up to the redwood post, then no permit for the reservoir would have been necessary. In accord with their alleged belief that they own all the property up to the redwood post, when the BLM requested that the Fadems renew the reservoir permit in 1968, they refused.

As a result of this refusal, the Fadems exchanged correspondence with the BLM, which finally acknowledged in a letter dated October 30, 1970, that there was a legitimate boundary dispute. The BLM agreed to conduct a survey to determine the exact location of the line between Sections 9 and 10 before requiring the Fadems to renew their permit. The letter stated that:

> [The Assistant Secretary of the Interior] concluded that a question of land status had been suf-

> ficiently raised by your correspondence to suspend the matter pending a cadastral survey of the section line common to section 9 and 10. If an official survey confirms the location of the reservoir on public land, you will be required, following notification, to secure a right-of-way as you were requested in 1968.

Apparently, this survey was completed in 1970, but not approved until 1980. According to the survey, the line between Section 9 and Section 10 was located approximately 200 feet west of the reservoir. As a result, the Government claims title to the entire 500 feet of land between the line established by the survey and the redwood post.[2] The Fadems claim they did not find out about the survey results until after they filed a conversion action against the Government in December 1983, alleging thefts by BLM employees of culverts and culvert connectors from the Fadems' ranch. However, the Fadems may have had some notice of the survey in 1981 due to a "passing remark" of a BLM employee.

Also, sometime in the mid-1960s, the BLM constructed a road which extended an existing road across the eastern section of the property. Although the exact date of this construction is unclear, it may have given the Fadems notice of the Government's

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[2] For the purposes of this opinion, it is helpful to refer to the land in dispute in two separate sections. We will refer to the 300 feet east of the reservoir up to the redwood post as the "eastern section" and to the 200 feet west of the reservoir up to the survey line as the "western section."

claim at least to the eastern section and certainly to a right of way across this section.

Finally, in February 1988, the Fadems filed suit against the Government pursuant to the QTA challenging its claim to the disputed property. The district court granted the Government's motion for dismissal, holding that, with regard to the eastern section of the disputed land, the Fadems had notice for over twelve years prior to the filing of the suit, and thus, their claim was barred by the statute of limitations. *See* 28 U.S.C. § 2409a(g). Further, it held that the doctrine of equitable tolling did not apply under the QTA. With regard to the western section of disputed land, the district court held that the Fadems had notice of the "contours" of the United States' claim, and thus, a suit challenging title to this section was also barred.

DISCUSSION

A. *Standard of Review*

The district court's dismissal on statute of limitations grounds presents a question of law reviewed *de novo*. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

B. *Equitable Tolling and the QTA*

"Under the [QTA], the United States, subject to certain exceptions, has waived its sovereign immunity [permitting] plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest." *Block v. North Dakota*, 461 U.S. 273, 275-76 (1983) (footnote omitted). The QTA provides "the exclusive procedure by which a claimant

can judicially challenge the title of the United States to real property." *Id.* at 276-77. Claims brought pursuant to the QTA are subject to a twelve-year statute of limitations:

> Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

In *McIntyre v. United States*, 789 F.2d 1408 (9th Cir. 1986), we held that this statute of limitations was "a jurisdictional prerequisite" and that "equitable estoppel or tolling [could not] be used to circumvent the Act's 12-year statute of limitations." *Id.* at 1411. However, we now hold that this rule in *McIntyre* was overruled by the Supreme Court's subsequent decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

In *Irwin*, the Supreme Court addressed the issue of whether the plaintiff's claim was barred by 42 U.S.C. § 2000e-16(c), requiring a civil suit under Title VII to be filed within 30 days of receipt of the Equal Employment Opportunity Commission's right-to-sue letter. *Id.* at 92. It held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96. Although the Court in *Irwin* was addressing a claim

under Title VII, it intended to create a general rule that equitable tolling was a defense to all federal statutes of limitations, unless Congress provided otherwise. *Id.*; *see also Goodhand v. United States*, 40 F.3d 209, 213 (7th Cir. 1994); *Glarner v. United States, Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994); *Long v. Frank*, 22 F.3d 54, 58 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

The Government offers several arguments challenging the applicability of equitable tolling to the QTA's statute of limitations. All of its arguments are premised on the assertion that the presumption of equitable tolling established by *Irwin* is rebutted because Congress provided that equitable tolling does not apply to the QTA's statute of limitations. We reject each of the Government's arguments.

First, the Government relies on *Block*, 461 U.S. at 273, to argue that the QTA's statute of limitations is jurisdictional. In *Block*, the Court held that if a suit under the QTA is time-barred by the statute of limitations, then federal courts have "no jurisdiction to inquire into the merits." *Id.* at 292. Similarly, the Court in *United States v. Mottaz*, 476 U.S. 834 (1986), held that "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *Id.* at 841. "'[A] statute of limitations . . . constitutes a condition on the waiver of sovereign immunity,'" and thus, defines jurisdiction. *Id.* (quoting *Block*, 461 U.S. at 287). However, the Court in *Irwin* reasoned that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little,

if any, broadening of the congressional waiver." 498 U.S. at 95. Thus, as this court has previously noted, the Court in *Irwin* "held that federal statutory time limitations on suits against the government are *not* jurisdictional in nature." *Garrett*, 10 F.3d at 1437 (emphasis added) (citing *Irwin*, 498 U.S. at 89). Consequently, we hold that the statements in *Block* and *Mottaz* that the QTA's statute of limitations is jurisdictional in nature have no continuing validity after the Court's decision in *Irwin*.

Second, the Government argues the legislative history of the QTA discloses a congressional intent to impose a twelve-year statute of limitations without possibility of equitable tolling. Again, the Government relies on the Supreme Court's decision in *Block*. In *Block*, the Court rejected North Dakota's argument that it could maintain an "officer's suit" to challenge the United States' claim to portions of the bed of the Little Missouri River. Focusing on the legislative history, the Court held that the QTA was "the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block*, 461 U.S. at 286. The Court also stated that "[t]he legislative history is clear that Congress intended to foreclose totally any suit on claims that accrued more than 12 years prior to the effective date of the QTA." *Id.* at n. 23. However, we construe this language as referring to the Court's conclusion that officer's suits could not be used to circumvent the exclusive remedy of the QTA, not as precluding the availability of equitable tolling.

The Government also relies directly on the legislative history of the QTA. It argues the original

Senate Report referred to the proposed QTA as jurisdictional and stated that "[i]n no way would it alter the substantive rules of law prevailing in actions against the Government." S. Rep. No. 92-575 (Dec. 10, 1971). However, a statement that the QTA was not intended to alter substantive rules of law says nothing about the effect of a statute of limitations, which is traditionally regarded as a procedural bar to an action and does not directly affect underlying rights. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) ("[A]s a matter of constitutional law . . . statutes of limitation go to matters of remedy, not to destruction of fundamental rights.").

The Government, relying on the House Report, also argues that legislative history indicates the twelve-year statute of limitations was intended to prevent stale claims. This report states that "the period is fixed . . . so that the government will not have to defend against [stale] claims," and that the statute of limitations "will make a reasonable provision for the bulk of existing controversies." H.R. Rep. No. 1559, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4547, 4550-51. However, this language indicates nothing more than Congress imposed the QTA's statute of limitations for the usual purpose, namely, to limit stale claims.

In sum, neither the legislative history nor the Court's decision in *Block* precludes application of equitable tolling to suits brought pursuant to the QTA. Thus, we hold that the doctrine applies to the QTA's statute of limitations. Because the district court held otherwise, it never had the opportunity to consider whether equitable tolling should apply to the

Fadem's QTA claim. On remand, it should make that determination.

C. The "Contours" of the Government's Claim

The Fadems' only apparent notice of the Government's claim to the property in question included the reservoir permit dispute and the road construction. Both of these incidents related solely to the eastern section of the disputed property. Notice that the Government claimed the western section did not occur until the survey was approved in 1980. However, the district court, relying on *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980), held that the Fadems' entire QTA claim was time-barred because they had notice of the "contours" of the Government's claim.

In *Knapp*, the plaintiffs brought suit pursuant to the QTA challenging the United States' claim to a forty-eight acre parcel of land. Although the land had been transferred to the United States pursuant to a deed filed in 1939 which described the entire forty-eight acres, the plaintiffs alleged that the deed's description was a mutual mistake of fact and that the deed actually intended only to transfer enough land for an easement. *Id.* at 282. The district court accepted this allegation as true and concluded that the United States' claim to more than the easement did not arise until 1971 when it approved a survey covering the disputed land. *Id.* The Tenth Circuit reversed the district court. It noted that a claim under the QTA accrues when a plaintiff knew or should have known of the United States' claim, but it held that "[k]nowledge of the claim's full contours is not required. All that is necessary is a reasonable

awareness that the Government claims some interest adverse to the plaintiff's." *Id.* at 283.

The district court in this case also relied on *Park County, Montana v. United States*, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), to conclude the Fadems had notice of the Government's entire claim. In *Park County*, the Forest Service placed a sign and rock barrier across a right-of-way, prohibiting motor vehicle traffic. *Id.* at 720-21. The claimants argued this sign only gave it notice of the United States' title claim to the road extending beyond the sign. However, we rejected this argument, holding that notice of the United States' claim to a section of the right-of-way "should have put the [claimants] on constructive notice and alerted them to make reasonable inquiry as to the remainder of the purported right-of-way since the remainder would have little or no remaining utility if it were severed." *Id.* at 721 n. 6.

Although we agree that precise knowledge of the entirety of the United States' claim is not necessary in order for a claimant to have notice of that claim, we hold that application of the "contours" doctrine established by *Knapp* is improper in this case. In Knapp, the 1939 deed to the United States described the entire forty-eight acres in dispute. Even though the claimants alleged the deed was based on a mutual mistake, it did give them notice that the United States could potentially claim a larger interest than an easement; the extent of a possible federal claim was dictated by the terms of the deed. Conversely, in this case, until the Government approved the survey, the Fadems knew only that the Government claimed

title to the eastern section. There was no evidence, such as the deed in *Knapp*, to give the Fadems notice the Government would assert a claim to the western section. Likewise, *Park County* is distinguishable from this case because, unlike a right-of-way which would have no utility if severed, the utility of the western section is not injured by the United States' possession of the eastern section.

No investigation by the Fadems prior to the approval of the survey in 1980 would have disclosed the United States' claim to the western section of the disputed land because the United States did not know that it had a claim to that strip until the survey was approved. Therefore, we hold that, at least until approval of the survey in 1980, the Fadems did not have constructive notice of the Government's claim to the western section.

The judgment of the district court is REVERSED and the case REMANDED for further proceedings. No costs allowed.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NOS. 92-56400, 92-56407

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Southern District of California
D.C. No. CV-88-01507-JSR
D.C. No. CV-85-01787-JSR

[Memorandum Filed June 22, 1994
Memorandum Withdrawn Oct. 20, 1994
Decided Mar. 29, 1995]

Before: BRIGHT*, WIGGINS and T.G. NELSON, Circuit Judges.

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* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

MEMORANDUM[**]

The parties are familiar with the facts so we need not restate them here. Appellants' request to submit additional briefing is DENIED.

A. *Fadem v. United States* (No. 92-56407) (*Fadem III*).

This case was filed pursuant to the Federal Tort Claims Act (FTCA), essentially alleging negligent resurvey of the land. In *Fadem v. United States*, 791 F.2d 1381 (9th Cir.1986) (*Fadem II*), this court held that the exclusive vehicle for challenging the United States' title to real property was the Quiet Title Act, 28 U.S.C. § 2409. *Id.* at 1382. Fadem's reliance on *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 756 (4th Cir.1990), is misplaced. To the extent that *Dunbar* can be read to permit a quiet title action against the United States under the FTCA, it is in conflict with both *Fadem II* and *Block v. North Dakota*, 461 U.S. 273 (1983). The claimed negligence of the Government in resurveying the boundary has no independent significance beyond whether or not the line is correct. Thus, it is subsumed in the title question and not an independent claim for relief. The district court was correct in dismissing *Fadem III*.

B. *Fadem v. United States* (No. 92-56400) (*Fadem V*)

Fadem's FTCA claim for trespass during the process of the resurvey can have no validity unless such a claim would be valid under the law of the State

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[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

of California. A surveyor's privilege is well established under California law. Cal.Civ.Code § 846.5 (West 1982 and Supp.1992). Fadem's apparent contention that the privilege does not apply because the survey was negligently done is unconvincing. The privilege applies to persons "legally authorized to practice land surveying." Cal.Civ.Code § 846.5(a). It is not limited to those persons engaged in surveying boundary lines where the line proves to be correctly located or is located to the satisfaction of the adjoining owners.

Fadem has not shown that the markers were other than incidental to the survey, and thus their placement came within the privilege. The district court correctly dismissed *Fadem V*.

To the extent that *Fadem V* also constituted an attempt to raise title questions under the FTCA, those claims were properly dismissed for reasons given above in the discussion of *Fadem III*.

CONCLUSION

The dismissals of the cases of *Fadem v. United States*, No. 92-56407 (*Fadem III*), and *Fadem v. United States*, No. 92-56400 (*Fadem V*), are in all respects AFFIRMED.

No costs allowed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56400
D.C. No. CV-88-01507-JSR

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

No. 92-56404
D.C. No. CV-88-00203-JSR

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

No. 92-56407
D.C. No. CV-85-01787-JSR

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Oct. 20, 1994]

ORDER

Before: BRIGHT*, WIGGINS and T.G. NELSON, Circuit Judges.

Judge Bright and Judge T.G. Nelson have voted to grant Appellants' petition for rehearing.

Fadem I, *Fadem III*, *Fadem IV* and *Fadem V* are cases consolidated in the district court for all purposes. Appellants appealed the district court's dismissal of *Fadem III*, *Fadem IV* and *Fadem V*. However, at the time of the appeal, it appeared that the district court had not yet resolved *Fadem I*. Consequently, the panel dismissed the appeal in a memorandum disposition, relying on *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). *Huene* held that an order disposing of less than all of the consolidated cases is not a final order and is not appealable absent certification pursuant to Fed. R. Civ. P. 54(b). *Id.* at 705.

Unknown to the panel at the time of its decision, *Fadem I* had actually been resolved by settlement. The chronology of relevant events is as follows: On September 11, 16 and 17, 1992, Appellants filed notices of appeal in *Fadem III*, *Fadem IV* and *Fadem V*. On September 28, 1992, the district court entered an order of settlement in *Fadem I*, and on January 6, 1993, it entered an order dismissing *Fadem I*. On March 10, 1994, this appeal was submitted to the panel.

We have not previously addressed the issue of whether we may assume jurisdiction where the appellant files a notice of appeal from a nonfinal order

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* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

disposing of only some of the consolidated cases, but subsequently, the remaining consolidated cases are finalized. However, in similar situations, we have held that we may assume jurisdiction absent the requisite Rule 54(b) certification where that absence is cured subsequent to the notice of appeal.

In *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980), an appeal in a multiple defendant suit, the appellant filed a notice of appeal from a nonfinal order dismissing some, but not all, of the defendants. Subsequently, the remaining defendants were dismissed. We noted that ordinarily we would not have jurisdiction absent Rule 54(b) certification. *Id.* at 680. However, we held that "subsequent events can validate a prematurely filed appeal" and treated the orders appealed from as final orders because the district court had dismissed the remaining defendants. *Id.* at 681. We reasoned that there was "no danger of piecemeal appeal" and that "a practical rather than a technical construction to the finality rule" was appropriate. *Id.* Likewise, with regard to multiple claim suits, we have held that "judgments whose finality would normally depend upon a Rule 54(b) certificate may be treated as final and appealable under [28 U.S.C.] § 1291 if remaining claims subsequently have been finalized." *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1075 (9th Cir. 1994) (internal quotation and brackets omitted).

In accord with our "pragmatic approach to finality in situations where events subsequent to a nonfinal order fulfill the purposes of the final judgment rule," *id.*, we hold that if the absence of Rule 54(b) certification in consolidated cases is cured after the notice of appeal is filed and if there is no prejudice to the parties, we have jurisdiction over the appeal. *Cf.*

Kersh v. General Counsel of Assemblies of God, 804 F.2d 546, 547-58 n. 1 (9th Cir. 1986) (proper Rule 54(b) certification in consolidated cases obtained after notice of appeal was filed is sufficient to confer appellate jurisdiction), *overruled on other grounds by, Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1574 (9th Cir. 1990); *Freeman v. Hittle*, 747 F.2d 1299, 1302 (9th Cir. 1984) (same). In this case, although Rule 54(b) certification would ordinarily be required, its absence was cured when the district court dismissed *Fadem I* and no appeal was taken from that dismissal. Both parties fully briefed the appeal and both request that we exercise jurisdiction in this case; thus, neither party is prejudiced. Consequently, we hold that we have jurisdiction.

The memorandum decision is withdrawn and the petition for rehearing is GRANTED.

WIGGINS, J., dissenting:

The majority holds that the absence of Rule 54(b) certification in consolidated cases can be cured by finalization of outstanding claims after the notice of appeal is filed, if there is no prejudice to the parties. I dissent because the majority's broad rule, an uncodified extension of Federal Rule of Civil Procedure 54(b), threatens to swamp the narrowly crafted Federal Rule of Appellate Procedure 4(a)(2). The rule announced by the majority takes over the function of Rule 4(a)(2) and allows appeals in situations that Rule 4(a)(2) does not cover. Moreover, the new rule creates uncertainty over jurisdiction, resulting in the potential for unfairness to litigants and in needless expenditure of judicial resources. Accordingly, I would not allow subsequent finalization of remaining claims in a

consolidated case to substitute for certification under Rule 54(b).

The majority's holding has its roots in the principle announced in *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980), that "subsequent events can validate a prematurely filed appeal." *Id.* The principle was based on two cases, *Ruby v. Secretary of Navy*, 365 F.2d 385, 389 (9th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1011 (1967), and *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 271 (9th Cir. 1965), that subsequently formed the basis for Rule 4(a)(2). *See* Fed. R. App. P. 4(a)(2) advisory committee's note discussing 1979 amendments. *Anderson* itself was not mentioned by the advisory committee. *Id.*

Rule 4(a)(2) provides that, except as otherwise provided in Rule 4(a)(4), a notice of appeal "filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." In the paradigmatic Rule 4(a)(2) situation, a decision ending litigation on the merits is announced from the bench. Notice of appeal is filed before judgment is actually entered. Rule 4(a)(2) allows the premature notice of appeal to ripen when judgment is entered. *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991).

Rule 4(a)(2) as adopted is narrower than the sweeping statements of *Anderson*, which has since been cited for the proposition that "judgments whose finality would normally depend upon a Rule 54(b) certificate may be treated as final if remaining claims subsequently have been finalized, even by developments occurring after appeal." *Baker v. Limber*, 647 F.2d 912 (9th Cir. 1981). In *FirsTier*, the Supreme

Court clarified the situations in which Rule 4(a)(2) may be used to validate a prematurely filed appeal.[1] Any doubt that 4(a)(2) is narrower than *Anderson* has been removed by *Serine v. Peterson*, 989 F.2d 371, 372 (9th Cir. 1993) (holding that a notice of appeal from a magistrate's order was not validated when those recommendations were later adopted by the district court).

Any appeal that fits under Rule 4(a)(2)'s narrow exception would also be allowed under *Anderson*'s sweeping principle. Rule 4(a)(2), and *FirsTier*'s and *Serine*'s careful consideration of its limits, would be entirely unnecessary if the language of *Anderson* and subsequent cases were given its full scope. *Anderson* and its progeny should, therefore, be reconsidered.[2]

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[1] In *FirsTier*, the Supreme Court stated:

> Rule 4(a)(2) [does not permit] a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise.

498 U.S. at 276.

[2] *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073 (9th Cir. 1994), a recent case that adopted *Anderson* without mentioning Rule 4(a)(2) or discussing the implications of *FirsTier*, should not substitute for such reconsideration.

On reconsideration, the *Anderson* principle should not be adopted. Neither *Anderson* nor its progeny gave adequate consideration to the potential problems of the *Anderson* approach. It is my view that confusion, unfairness, and waste of judicial resources result from allowing the absence of 54(b) certification to be cured by subsequent events disposing of outstanding claims or parties in consolidated cases.

In this Circuit, 54(b) certification obtained after the notice of appeal can validate a prematurely filed appeal if neither party is prejudiced. *Freeman v. Hittle*, 747 F.2d 1299, 1301-02 (9th Cir. 1984). Because the danger of piecemeal appeals is even less when the entire case is wrapped up than when 54(b) certification is granted, it may seem like a natural step to allow subsequent events resulting in a final entry of judgment to substitute for the entry of judgment pursuant to 54(b). However, dispensing with the requirement of 54(b) certification means that our jurisdiction over an appeal could remain uncertain until the day of the hearing. If 54(b) certification is a prerequisite to jurisdiction, it becomes clear on the day that 54(b) certification is granted or denied that we either have or lack jurisdiction over the appeal. If certification is denied, the appeal may be dismissed. In contrast, settlement or other disposition of the case can happen at any time. Under the new rule allowing settlement or disposition to validate the notice of appeal, this court could obtain jurisdiction at any time, without warning.

The jurisdictional uncertainty created by the new rule can affect the appellant and appellee unequally. Under a rule clearly requiring 54(b) certification, appellant and appellee are both aware of any pending motion and are equally positioned to assess its

chances of success. The same is not true of settlement or other disposition of remaining claims that might validate the appeal. The outstanding claims or parties may concern only the appellant or appellee. While one party is conducting negotiations or arguing summary judgment motions on the remaining claims with third parties, the other party to the appeal may be unaware that settlement or disposition is likely. If the subsequent settlement is allowed to validate the appeal, the other party may not realize that this court has jurisdiction until the day of the hearing—or after, as in the current appeal.

Inquiring whether the parties are prejudiced by subsequent validation of the appeal may not fully correct the imbalance created by a system in which 54(b) certification may be dispensed with. First, one party will generally know sooner than the other that argument on the merits will be necessary. Second, the fact that the validity of the appeal depends on the actions of one party but not the other gives one party unequal negotiating power during the pendency of the appeal.

The uncertainty over jurisdiction created by the new rule may not only cause unfairness to litigants, but also waste appellate court resources. This appeal is a case in point. A panel of judges prepared to hear the merits of the case, only to discover that the court lacked jurisdiction. The panel agreed to dismiss the case, only to discover, on petition for rehearing, that the court had jurisdiction after all. The panel will now reconvene to hear the merits. Attorneys will prepare a second time for oral argument and will travel again to where the panel sits. Such an expenditure of resources in this and similar cases could be saved by continuing to require 54(b) certification.

Once the rule requiring 54(b) certification is clear, dispensing with 54(b) certification yields no benefits to offset the potential unfairness and uncertainty. At best, the exception allows an appellant whose notice of appeal was premature to escape the consequences of his mistake. At worst, the exception opens the door to manipulation by litigants and removes the district judge as a check on procedural jockeying. Although I, too, would support "a pragmatic approach to finality in situations where events subsequent to a nonfinal order fulfill the purposes of the final judgment rule," *Dannenberg*, 16 F.3d at 1073, I do not believe that the purposes of that rule are always filled by settlement or disposition of remaining claims. For this reason, I would hold that the absence of 54(b) certification can be cured only by 54(b) certification.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NOS. 92-56400, 92-56404, 92-56407

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE (THREE CASES)

Appeal from the United States District Court
for the Southern District of California
D.C. Nos. CV-88-01507-JSR, CV-88-00203-JSR,
and CV-85-01787-JSR

[Decided June 22, 1994]

Before: BRIGHT*, WIGGINS, T.G. NELSON, Circuit Judges.

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* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

MEMORANDUM**

This case involves a land dispute between owners of high desert property in southern California and the Bureau of Land Management ("BLM"). Several actions instituted by the Fadems ("Appellants") were consolidated before the district court. We conclude that this court lacks jurisdiction over this appeal because the district court did not finally dispose of one of the consolidated actions.

PROCEDURAL HISTORY

On December 9, 1983, Appellants filed a trespass and conversion complaint in a California court against agents and employees of the BLM for the taking of steel culverts and culvert connectors for repair to the road extension ("*Fadem I*"). The case was transferred to the Southern District of California.

The remainder of the actions stem from Appellants' attempts to dispute a BLM resurvey that reduces the size of their property. Appellants claim they obtained actual knowledge of the BLM resurvey only in 1983. Appellants argued to the BLM, without success, that the resurvey was not legitimate. On December 12, 1984, Appellants filed a complaint under the Bona Fide Rights Act, 43 U.S.C. § 772, seeking correction of the resurvey. That case was dismissed on the grounds that the Bona Fide Rights Act did not create a private cause of action and that the Quiet Title Act ("QTA"), 28 U.S.C. § 2409, was the exclusive vehicle for chal-

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

lenging the United State's title to real property. The Ninth Circuit affirmed that holding in *Fadem v. United States*, 791 F.2d 1381 (9th Cir.1986) (per curiam) (hereinafter *Fadem II*). The court at that time expressed no opinion as to the availability of remedies under the QTA. *Id.* at 1383.

In the meantime, on August 7, 1985, Appellants filed another complaint (*Fadem III*), originally based on the Administrative Procedures Act, but later amended to state a claim under the Federal Tort Claims Act ("FTCA"), alleging that the resurvey caused them to lose acreage and suffer other damages.

Finally, on February 10, 1988, Appellants filed a QTA action (*Fadem IV*) in the district court. In addition, on September 26, 1988, they filed another FTCA action (*Fadem V*) in the Claims Court that alleges that numerous negligent acts, including the resurvey, deprived them of their property without compensation.

In July of 1990, all of the Fadem cases (except *Fadem II*, which was resolved by this court, and *Fadem VI*, a QTA action still pending in the district court), were consolidated in the Southern District. The four other cases, including the trespass and conversion case (*Fadem I*), the two FTCA cases (*Fadem III* and *Fadem V*), and the QTA case (*Fadem IV*) were consolidated for all purposes. *Fadem III* was dismissed on July 8, 1992. *Fadem IV* was dismissed on May 15, 1992, and was denied reconsideration on August 31, 1992. *Fadem V* was dismissed on August 31, 1992. The Fadems have appealed the orders dismissing *Fadem III* (D.C. No. 85-1787-

R(M)/C.A. No. 92-56407), *Fadem IV* (88-0203-R(M)/92-56404), and *Fadem V* (88-1507-R(M)/92-56400). *Fadem I*, however, has not been completely resolved. The district court granted part of a motion to dismiss, but some claims remain, including a conversion claim against the government.

JURISDICTION

A case is not final and reviewable until the district court enters the judgment "end[ing] the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). *Huene v. United States*, 743 F.2d 703 (9th Cir.1984), holds that an order that disposes of just one out of two or more consolidated cases is not a final order and is not appealable absent a certification pursuant to Fed.R.Civ.P. 54(b). The court said that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court." *Id.* at 705. This court may not assume that the district court will take the steps necessary to make the judgment final and confer appellate jurisdiction. *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 481-82 (9th Cir.1994).

In the appeal before this court there has been no "final judgment that resolves all of the consolidated actions." *Huene*, 743 F.2d at 705. Nor has there been any Rule 54(b) certification. That being the situation, this court is without jurisdiction to hear the appeal. We will consider the merits at such time as the

district court enters judgment on *Fadem I* or certifies any issues it feels are appropriate for appeal.

DISMISSED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 84-0306-R(M)
CONSOLIDATED WITH: CIVIL NO. 88-0203-R(M)

ROBERT S. FADEM, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Aug. 31, 1992]

ORDER DENYING MOTION FOR RECONSIDERATION IN *FADEM IV*

Plaintiffs have filed a motion for reconsideration of this court's conclusion in an Order filed November 12, 1991, that was finalized on May 15, 1992 in a stipulated order signed by the parties. The November 12, 1991 Order concluded that the Supreme Court case, *Irwin v. Veterans Administration*, U.S., 111 S. Ct. 453 (1990) did not require that the 12 year statute of limitations applicable to Quiet Title Act suits be equitably tolled to allow late filings. In reaching that

conclusion, this court denied the plaintiffs' motion for reconsideration.*

Plaintiffs now move again for reconsideration based on *Schmidt v. United States*, 933 F.2d 639 (8th Cir. 1991). *Schmidt* involved the equitable tolling of the statute of limitations (two years) for actions under the Federal Tort Claims Act. *Irwin* involved an even more compelling fact situation to justify equitable tolling; the plaintiff's rights expired after a 30 day period had run. The court has reviewed the holding of *Irwin*, the instructive, but not binding, decision in *Schmidt*, and the November 12, 1991 Order Denying Motion for Reconsideration. The court also adopts by reference the discussion of motions for reconsideration set forth in this court's Order Denying Motion for Reconsideration in Fadem III filed August 31, 1992. The law, as interpreted by the Ninth Circuit Court of Appeals and the Supreme Court, was properly applied to the present controversy, and the plaintiffs' motion for reconsideration is denied.

IT IS SO ORDERED:

DATE: 8/31/92 /s/ John S. Rhoades, Sr.
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

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* The government claims that the plaintiffs' second motion for reconsideration is untimely, since it was filed more than 30 days after the filing of this court's November, 1991 Order. The government's argument may have merit, thus offering an additional basis for the result reached today.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 84-0306-R(M)
CONSOLIDATED WITH CASE NOS.
CIVIL NO. 85-1787-R(M)
CIVIL NO. 88-0203-R(M)
CIVIL NO. 88-1507-R(M)

ROBERT S. FADEM, ET AL., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AND CONSOLIDATED CASES

[Filed May 13, 1992]

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS IN CONSOLIDATED CASE NO. 88-0203-R(M) ["FADEM IV"]

The Defendant United States' Motion to Dismiss or in the Alternative for Summary Judgment in Case No. 88-0203-R(M) ["FADEM IV"], came on regularly for hearing on December 3, 1990, and Plaintiff's motion for reconsideration of the court's oral ruling of December 3, 1990, came on for hearing on November 12, 1991. The court's written order denying Plaintiffs' motion for reconsideration, filed herein on November 12, 1991, is incorporated herein by this

reference. D. Michael Waltz, Assistant U. S. Attorney, appeared for Defendant United States of America, and Joel C. Estes appeared for Plaintiffs Robert S. Fadem and Mary O. Fadem. The court, having considered the files, the pleadings of the parties and having heard and considered the oral arguments of the parties, finds that the Defendant's motion to dismiss the complaint is well taken and should be granted.

The court further incorporates by reference into this Order the transcripts of its oral rulings made at the hearings of this motion and the motion for reconsideration.

In this case, the Plaintiffs have alleged a Quiet Title Act suit against the United States, 28 U.S.C. § 2409a. Plaintiffs allege two distinct theories or claims for relief. Their first claim, which Defendant has referred to as the "good faith title/redwood post" claim, [is] time-barred by the applicable 12-year statute of limitations, 28 U.S.C. § 2409a(g). The court finds there is no genuine issue as to the fact that Plaintiffs had notice of the government's claim of ownership of the real property which is the subject of Plaintiffs' first claim more than twelve (12) years prior to the filing of this action. Accordingly, the first claim must be dismissed with prejudice as time-barred.

Plaintiffs' second claim, which Defendant has referred to as the "one and one-half mile shift" claim, alleges that Plaintiffs' true property is located one and one-half miles west of the property the plaintiffs have actually occupied for the past 34 years. This second claim must also be dismissed.

First, the court finds that there is no genuine issue as to the fact most of the land located one and one-half

miles west, of which Plaintiffs assert ownership in their second claim, is in fact private property, not owned by the United States. The Quiet Title Act is inapplicable to, and gives the court no jurisdiction over, land ownership disputes concerning private lands in which the United States does not claim an interest. 28 U.S.C. § 2409a(a). Thus, the court lacks subject matter jurisdiction under the Quiet Title Act, or otherwise, over the United States as to the vast majority of Plaintiffs' "one and one-half mile shift" claims. In addition, the private persons whose title would clearly be affected by the "shift" of the boundaries of Plaintiffs' property one and one-half miles to the west have not been joined as Defendants in this action. The court concludes these private persons are indispensable parties pursuant to Rule 19, Fed. R. Civ. P., and that this second claim must be dismissed if the absent indispensable parties are not joined in this action. Rule 19, Fed. R. Civ. P. The court therefore dismisses Plaintiffs second claim. Although the court indicated at the hearing of Defendant's motion that it would grant leave to Plaintiffs to file an amended complaint joining the necessary indispensable parties as additional Defendants within 30 days of the entry of this Order, Plaintiffs have since indicated that they do not presently intend to pursue their second claim. Accordingly.

IT IS ORDERED that the motion of the United States for dismissal of this action be and hereby is granted. The Clerk of the Court is directed to enter judgment in favor of the United States.

DATED: 5/12/92

/s/ John S. Rhoades
JOHN S. RHOADES
UNITED STATES
DISTRICT JUDGE

PREPARED BY:

WILLIAM BRANIFF,
United States Attorney

/s/ D. Michael Waltz
D. MICHAEL WALTZ
Assistant U.S. Attorney
Attorneys for Defendant
United States of America

APPROVED AS TO FORM:

/s/ Joel C. Estes
JOEL C. ESTES
Attorney for Plaintiffs

APPENDIX G

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

ROBERT S. FADEM, et al., [Filed May 15, 1992]

v.

UNITED STATES OF AMERICA

CASE NUMBER: 88-203-R(M)

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the motion of the United States for dismissal of this action be and hereby is granted.....

[seal omitted]

May 15, 1992 — DON HENDRIX

Date — Clerk

/s/ signature illegible

(By) Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

84-0306-R(M)

ROBERT S. FADEM, ET AL., PLAINTIFFS,

v.

HARVEY YATES, ET AL., DEFENDANTS

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN S. RHOADES
UNITED STATES DISTRICT JUDGE

Taken at:
SAN DIEGO, CALIFORNIA
MONDAY, DECEMBER 3, 1990
11:25 A.M.

APPEARANCES:

FOR THE PLAINTIFFS: JOEL ESTES, ESQ.
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ROOM NO. 3N10B
SAN DIEGO, CA 92189
(619) 232-0544

PROCEEDINGS REPORTED STENOGRAPHICALLY; TRANSCRIPT PRODUCED BY COMPUTER.

[27] * * * * *

THE COURT: OKAY. I UNDERSTAND YOUR POSITION. I KNOW IT IS A DIFFICULT POSITION.

ALL RIGHT. AT SOME POINT IN TIME—I HAVEN'T BEEN OUT THERE SINCE THE CHARGERS WERE OUT THERE, AND WE OUGHT TO GET A BORDER PATROL TO GET A HELICOPTER AND GO OUT THERE AND HAVE A PICNIC AND LOOK AROUND, BECAUSE YOU ARE TALKING ABOUT THINGS THAT YOU KNOW—THE LAND—OR CERTAINLY THE SURVEYORS DO. THEY HAVE BEEN UP AND DOWN THERE. I AM TALKING OFF THE TOP OF MY HEAD. I REALIZE SOME OF THE THINGS I AM SAYING I REALLY DON'T FULLY UNDERSTAND. AGAIN, AT THE RISK OF BEATING THE HORSE AGAIN, THIS THING, IT HAS JUST GOT TO GO AWAY. YOU HAVE GOT TO SETTLE

IT. AND I URGE YOU TO DO DOWN THERE. I AM READY TO RULE AT THIS TIME.

THE PLAINTIFF BASES HIS JURISDICTION ON THE QUIET TITLE ACT, (QTA), 28 UNITED STATES CODE SECTION 2409(A).

I AGREE WITH THE GOVERNMENT THAT THE PLAINTIFFS' FIRST CLAIM I IS TIME-BARRED AND SHOULD BE DISMISSED FOR LACK OF JURISDICTION UNDER A(G). I ALSO AGREE THAT SINCE THE CLEAR MAJORITY OF THE PLAINTIFFS' SECOND CLAIM II (ABOUT 1000 ACRES OF APPROXIMATELY 1700 ACRES IN DISPUTE) INVOLVES A PRIVATE AND NOT A PUBLIC LAND DISPUTE. I AM NOT TALKING ABOUT THE MILE AND A HALF TO THE WEST PROBLEM. THERE IS NO JURISDICTIONAL BASIS UNDER THE QUIET TITLE ACT TO SUE THE UNITED STATES ON THE ENTIRE CLAIM.

FURTHER, SINCE THE PLAINTIFF HAS FAILED TO JOIN INDISPENSABLE PARTIES, THE PRIVATE LAND OWNERS, WHO WOULD BE AFFECTED BY THE MAJORITY OF CLAIM II IN ACCORDANCE WITH FRCP 19, THIS BECOMES A SECOND GROUND TO DISMISS CLAIM II. THAT DISMISSAL WILL BE WITHOUT PREJUDICE. IF YOU WANT TO AMEND AND BRING ALL OF THOSE PEOPLE IN SO WE CAN ADD TO THE CONFUSION, GO AHEAD AND DO SO.

THE MERITS OF THE BOUNDARY DISPUTE ASIDE, TIMELY COMMENCEMENT OF AN ACTION TO QUIET TITLE AGAINST THE UNITED STATES IS A PREREQUISITE TO SUBJECT MATTER JURISDICTION, *MCINTYRE VERSUS U.S.*, 789 F. 2D. 1408, 1411, 1986. THE STATUTE OF LIMITATIONS STARTS TO RUN WHEN THE PLAINTIFF OR ITS PREDECESSOR IN INTEREST KNEW OR SHOULD HAVE KNOWN OF THE CLAIM OF

THE UNITED STATES, QUOTE, WHICH IMPARTS A TEST OF REASONABLENESS, UNQUOTE.

KNOWLEDGE OF THE CLAIM'S, QUOTE, FULL CONTOURS, UNQUOTE, IS NOT REQUIRED. ALL THAT IS NECESSARY IS REASONABLE AWARENESS THAT THE UNITED STATES CLAIMS, QUOTE, SOME, UNQUOTE, INTEREST ADVERSE TO THE PLAINTIFF. *NORTH DAKOTA EX REL BD. OF UNIVERSITY VERSUS BLOCK*, 789 F. 2D 1308, 1313, EIGHTH CIRCUIT, 1986; *KNAPP VERSUS UNITED STATES*, 636 F. 2D 279 AT 283, TENTH CIRCUIT, 1980. WHETHER THE INTEREST CLAIMED AMOUNTS TO LEGAL TITLE IN THE UNITED STATES IS IRRELEVANT IF, QUOTE, IT CONSTITUTES A CLOUD ON PLAINTIFFS' TITLE, UNQUOTE. THAT'S THE *KNAPP* CASE AT PAGE 282.

DR. FADEM HAD HAD MORE THAN ONE INSTANCE OF NOTICE, AND HIS WIFE, THAT THE GOVERNMENT HAD A CLAIM OF INTEREST OVER THE DISPUTED PROPERTY.

IT IS NOT AN ISSUE OF FACT THAT THE PLAINTIFF MADE LAND-USE PERMIT APPLICATIONS TO BUILD HIS RESERVOIR IN BOTH 1957 AND AGAIN IN 1963. THE PREPARING AND FILING OF THESE PERMIT APPLICATIONS DID OR SHOULD HAVE PUT DR. FADEM ON NOTICE THAT THE GOVERNMENT HAD A CLAIM OF INTEREST. KNOWLEDGE OF THE EXACT NATURE OF THE GOVERNMENT'S CLAIM, AS THE CITED CASES REFLECT, IS NOT REQUIRED.

IN ADDITION, THE CONSTRUCTION BY THE GOVERNMENT OF THE MCCAIN VALLEY ROAD EXTENSION ACROSS THE DISPUTED STRIP OF LAND, WHICH WAS COMMENCED AT LEAST TWO YEARS PRIOR TO ITS COMPLETION IN 1965, PROVIDED OR SHOULD HAVE PROVIDED YET ANOTHER INSTANCE OF NOTICE TO PLAINTIFF THAT THE U.S. HAD SOME

INTEREST, UNDERLINE, "SOME", ALBEIT IT WAS NOT COMPLETELY DEFINED, IN THE DISPUTED PROPERTY. SEE *GROSZ*, G-R-O-S-Z, *VERSUS ANDRUS*, 556 F. 2D 975, NINTH CIRCUIT, 1977. ROAD CONSTRUCTION BY FEDERAL AGENCY SERVES AS NOTICE OF THE GOVERNMENTAL CLAIM OF INTEREST.

BECAUSE OF THESE INSTANCES OF NOTICE, WHICH CLEARLY RAISE A CLOUD OVER PLAINTIFFS' TITLE, THE PLAINTIFFS' FIRST CLAIM, THE GOOD FAITH CLAIM, HAD BECOME TIME-BARRED, AT THE LATEST, BY THE END OF 1975. THEREFORE, THE COURT HAS NO JURISDICTION OVER THAT CLAIM.

AT BEST, HOWEVER, THE ACTIONS BY THE BUREAU OF LAND MANAGEMENT, WHICH INDICATE AN UNCERTAINTY OVER THE EXACT LOCATION OF THE GOVERNMENT'S BOUNDARY, PROVIDE UNDERLYING FACTS TO SUPPORT THE MERITS OF THE PLAINTIFFS' BOUNDARY DISPUTE WITH THE GOVERNMENT. THESE ACTIONS DO NOT AMOUNT TO AN OFFICIAL DISCLAIMER BY THE UNITED STATES OF ANY INTEREST IN THE PLAINTIFFS' PROPERTY.

IN THE CASE CITED BY THE PLAINTIFF, *SODA FLAT COMPANY VERSUS HODEL*, 670 F. SUPP. 879, EASTERN DISTRICT CALIFORNIA, 1987, THE COURT WENT TO GREAT LENGTHS TO SUPPORT ITS HOLDING THAT THE GOVERNMENT WITHDREW ITS CLAIM OF INTEREST BY SPECIFICALLY MAKING A, QUOTE, FORMAL, RECORDABLE DISCLAIMER, UNQUOTE, OF ITS INTEREST IN THE LAND.

IN ADDITION, THE *SODA* COURT DISTINGUISHED ITS HOLDING BY FINDING THAT THE FACTS IN ITS CASE, QUOTE, NEVER INDICATED THAT THE UNITED STATES CLAIMED ANY INTEREST, UNQUOTE, IN THE LAND AT ISSUE. THAT'S AT PAGE 889.

IN CONTRAST, IN OUR CASE THERE WERE REPEATED INSTANCES OF A UNITED STATES CLAIM OF INTEREST IN THE LAND AND ONLY ONE LETTER WHICH TOLD THE PLAINTIFF THAT HE DID NOT HAVE TO GET ANOTHER PERMIT TO OPERATE ITS RESERVOIR ON THE LAND.

AS TO THE ESTOPPEL ARGUMENT, THE NINTH CIRCUIT HAS UNEQUIVOCALLY STATED THAT EQUITABLE ESTOPPEL OR TOLLING CANNOT BE USED TO CIRCUMVENT THE QUIET TITLE ACT'S 12 YEAR STATUTE OF LIMITATIONS. AGAIN, THE *MCINTYRE* CASE. THE QUIET TITLE ACT'S STATUTE OF LIMITATIONS IS A JURISDICTIONAL REQUIREMENT AND, QUOTE, THE GOVERNMENT MAY NOT BE EQUITABLY BARRED FROM ASSERTING JURISDICTIONAL REQUIREMENTS, UNQUOTE.

AS TO THE SECOND CLAIM, THE LANGUAGE OF 2409A ONLY PROVIDES FOR A WAIVER OF IMMUNITY—THIS IS THE MILE AND A HALF SHIFT—WHEN THE U.S. CLAIMS AN INTEREST IN THE DISPUTED PROPERTY. SINCE, HOWEVER, THE CLEAR MAJORITY (THAT IS ABOUT 1,000 ACRES OF APPROXIMATELY 1,700) OF CLAIM II INVOLVES A PRIVATE AND NOT A PUBLIC LAND DISPUTE, WHERE THE U.S. DOES NOT ASSERT AN INTEREST, THERE IS NO JURISDICTIONAL BASIS UNDER THE QUIET TITLE ACTION TO SUE THE U.S. ON THIS ENTIRE CLAIM.

IN ADDITION, FRCP 19(B) SPECIFICALLY PROVIDES THAT IF INDISPENSABLE PARTIES ARE NOT JOINED, THE COURT SHOULD DETERMINE WHETHER THE ACTION SHOULD BE DISMISSED DUE TO PREJUDICE TO ANY OF THE PARTIES.

FOR ALL THE ABOVE REASONS, I DISMISS THE ENTIRE COMPLAINT IN FADEM IV, 88-0203; THE SECOND CLAIM, AGAIN, IF YOU WANT TO BREAK IT

DOWN, IT WILL BE WITHOUT PREJUDICE. I AM NOT RULING ONE WAY OR THE OTHER AS TO WHETHER THESE PEOPLE CAN BE JOINED, BUT IF YOU WANT TO ATTEMPT TO, YOU CAN, THE PLAINTIFF CAN.

THE GOVERNMENT IS TO PREPARE THE ORDER, CONSISTENT WITH MY REMARKS TODAY, AND EXPRESSLY INCORPORATING THIS ORAL RULING, APPROVED AS TO FORM, TO BE SUBMITTED IN 15 DAYS.

AS TO THE INJUNCTION, THAT MOTION IS DENIED. I DON'T KNOW WHERE THE PROPERTY LINE IS SO I CAN'T TELL THEM TO MOVE A FENCE, IF I DON'T KNOW WHERE THE PROPERTY LINE IS. IT IS AS SIMPLE AS THAT. THE GOVERNMENT HASN'T PROVED IT.

OKAY. I AM GOING TO ORDER YOU TO GO BACK DOWN TO MAGISTRATE MC CUE TO SEE HIM AGAIN, NOT TODAY BUT MAKE ARRANGEMENTS TO SEE HIM, AND I AM GOING TO SET THE NEXT HEARING ON THIS—I WOULD LIKE TO MAKE IT SOONER, BUT YOU SAW THE CRIMINAL CALENDAR TODAY AND IT IS GETTING WORSE. AND TO SPEND THE TIME I HAVE TO ON THIS THING, I HAVE TO HAVE A LOT OF TIME TO GET READY. I AM GOING TO SET ANOTHER HEARING FOR MARCH 11TH AT 10:30. AT THAT TIME—I THINK I WILL DO IT A WEEK FROM TODAY. AFTER YOU TWO HAVE HAD A CHANCE TO THINK ABOUT IT, HAVE A STATUS HEARING AT 10:30 AND TELL ME HOW WE ARE GOING TO RESOLVE THIS PROPERTY LINE DISPUTE, IN WHAT MANNER. WHERE DO WE GO FROM HERE, BASICALLY, IS THE QUESTION I HAVE?

WE WILL BE IN RECESS.

MR. ESTES, I ASK YOU TO PREPARE THE ORDER ON THE INJUNCTION.

MR. ESTES: THANK YOU, YOUR HONOR.
THE COURT: THANK YOU.

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 84-0306-R(M)

ROBERT S. FADEM, ET AL., PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Nov. 12, 1991]

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff Fadem has brought a motion for reconsideration following the granting of the government's motion to dismiss the complaint in the case denominated Fadem IV. This is a case brought under the Quiet Title Act ("QTA") to determine the boundary line between the Fadem's property and public land.

The U.S. Supreme Court decided *Irwin v. Veterans Admin.*, ___U.S. , 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), in December of 1990. That case held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 457. Plaintiff claims that this

case overruled *McIntyre*, and that his claim can withstand the motion to dismiss since equitable tolling now applies against the U.S. as it has been applied against private litigants. The government claims that in this case the presumption in favor of equitable tolling can be rebutted. They cite to authority that the limitation in the QTA is jurisdictional, i.e., intended to foreclose totally any suits that accrued more than 12 years before the date of the QTA (i.e., 1972). Furthermore, the government cites a legislative history that convincingly demonstrates that Congress did not wish to entertain stale claims over 12 years old under the QTA. Defendant's Opposition to Motion, pp. 10-14.

Plaintiff replies that whether the statute of limitations is jurisdictional or not has no effect on the applicability of *Irwin*. *Irwin* overruled *Soriano v. U.S.*, 352 U.S. 270 (1957), which had included a claim by the plaintiff that was jurisdictionally barred. Plaintiff, however, makes no attempt to assail the comprehensive legislative history that the government cites. This evidence conclusively rebuts the presumption that equitable tolling should apply in this case. At several points, the House and Senate reiterated that the 12-year limitation was fixed to resolve most legitimate claims, yet prevent the government from having to defend against stale claims.

The House Report on the QTA states that the statute of limitations "concerns the period in which actions *must* be brought . . . . [A]ny civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Defendant's Opposition, Exhibit D (emphasis added).

. . . the period is fixed in this manner so that the government will not have to defend against state [sic: read "stale"] claims. *Id.* at 4550.

Furthermore, Congress has included equitable tolling provisions when it deems them appropriate. In quiet title actions where the U.S. is the plaintiff, Congress specifically included such provisions. 28 U.S.C. § 2416. Congress enacted the statute at issue, governing cases where the government is defendant, six years after it enacted that statute controlling cases where the government is plaintiff, with the knowledge that equitable tolling could be included. Congress has also taken a second look at the statute of limitation provision in the QTA following the Supreme Court decision in *Block v. North Dakota*, 461 U.S. 273 (1983), a decision that barred even suits by States that were not filed within the 12-year period. Again, Congress chose not to include equitable tolling provisions in the QTA.

The defendant also argues persuasively that a 12-year statute of limitation is very different from the 30-day statute at issue in *Irwin*. The plaintiff counters that the *Soriano* case, which prevented the wartime tolling of a six-year statute of limitations for claims against the U.S. government, was overruled by *Irwin*. Nevertheless, the 12-year statute of limitation is dramatically longer than either the 30-day period in *Irwin* or the 6-month period in *Soriano*, and together with the clearly expressed intent of Congress, suggests that the 12-year limit for actions under the QTA should be strictly enforced. Whether or not the statute of limitations is labelled "jurisdictional," the defendants have rebutted the presumption in favor of equitably tolling the QTA statute of limitations, and it is not necessary to examine the

elements of equitable estoppel. This result does, however, require consideration of the "contours" cases.

In Knapp v. U.S., 636 F.2d 279 (10th Cir. 1980), plaintiffs in a QTA sought to recover some of the 48 acres of land that they deeded to the government, claiming that the deeded land was intended to be a 2-acre right-of-way. The court held that an action accrues when "the plaintiff or his predecessor in interest knew or should have known of the claim of the U.S. [citation omitted] Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id.* at 283.

The plaintiff argues that the "contours" concept relates to the character of the claim, not to the geographical extent of the claim. Plaintiff's Memorandum in Support, p. 14. The government concedes that many of the cases address the nature of the government's claim rather than the extent of it; nevertheless, the same reasoning explains problems of both types, i.e., a landowner should make a diligent inquiry into the nature of the government's claim. They cite *Park County v. U.S.*, 626 F.2d 718 (9th Cir. 1980), a case in which the court found that notice that the U.S. claimed control over a substantial portion of the right-of-way should have given notice of a claim to the remainder of the right-of-way since the remainder would be of little use if it were severed.

I take the words of the *Knapp* holding at face value; the claim of the government is not restricted to the "character" of the claim. Plaintiffs have not successfully argued that that opinion governs only the legal character of the government's claim. The *Knapp* ruling, when compared with the language in *Park County*, suggests that the government's "claim" may

take more than one form. In *Park County*, that court held that a road sign put the plaintiffs on notice that the government claimed a substantial portion of the right-of-way, and that this should have put them on constructive notice to make reasonable inquiry as to the remainder of the right-of-way. Plaintiffs claim that this case involved a limited extent of land, and that there is no such limit to the government's claim on the Fadem ranch. The court held, however, that the sign placed on the road did not constitute notice only as to the portion of the right-of-way *behind* the sign. *Id.* at 720-21. Similarly, by requiring Fadem to apply for a permit for the reservoir, the government was asserting an interest that did not only define its claim to a roughly north-south line ending at the water reservoir. Plaintiffs were given reasonable notice at that time to make a diligent inquiry into the exact extent of the government's land, or failing that, to make a claim under the QTA within the 12-year period that ran from this time of notice.

For the foregoing reasons, plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED:

DATE: 11/12/91 /s/ John S. Rhoades, Sr.
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56404
D.C. No. CV-88-00203-JSR

ROBERT FADEM; MARY O. FADEM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed July 26, 1995]

ORDER

Before: BRIGHT*, WIGGINS and T.G. NELSON, Circuit Judges

The panel has voted to deny appellee's petition for rehearing. Judges Wiggins and T.G. Nelson vote to reject the suggestion for rehearing en banc and Judge Bright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

No. 95-1028

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROBERT FADEM and MARY O. FADEM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MARY O. FADEM

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QUESTION PRESENTED

Whether the 12-year statute of limitations applicable to actions against the United States brought under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(g), is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit ("Ninth Circuit"), which is the subject of the petition by the United States of America ("Petitioner") and this brief in opposition by Mary O. Fadem ("Respondent"),[1] is reported at 52 F.3d 202 and attached to Petitioner's brief at Appendix A, 1a-12a. The opinions and orders of the district court granting Petitioner's motion to dismiss, which Respondent appealed, are unreported but are attached to Petitioner's brief at Appendix E-I, 30a-49a. Other opinions of the Ninth Circuit relating to this matter are attached to Petitioner's brief at Appendix B-D, 13a-29a, and Appendix J, 50a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). After two extensions, outlined in Petitioner's brief, Petitioner filed its brief on or about December 26, 1995. Because of the death of Robert S. Fadem, Respondent sought an extension to file this brief in opposition on January 22, 1996. This Court granted Respondent an extension to February 29, 1996.

STATUTES INVOLVED

Title 28 of the United States Code, section 2409a(g) provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the

1. Robert S. Fadem, her husband, cannot file or join in a brief in opposition because he passed away on December 23, 1995.

date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

STATEMENT OF THE CASE

This is a quiet title action to settle a boundary dispute between two property owners of adjacent properties. One of the property owners is Respondent, a widow who, with her recently deceased husband, purchased their property forty (40) years ago in 1956. The other property owner is Petitioner, the government.

Between 1956 and 1963, Respondent and her husband sought to determine their eastern boundary (Petitioner's western boundary). Virgil Bottini ("Bottini"), area manager of the Bureau of Land Management ("BLM") and Petitioner's representative, misled Respondent and her husband into believing that they owned the disputed property. Bottini provided and showed Respondent and her husband a survey map to confirm their ownership of the disputed property.

In 1963, Petitioner commenced construction of a road on the disputed property which Respondent and her husband believed to be theirs. They objected to the apparent encroachment but later permitted it after Petitioner promised to survey the land and to compensate Respondent and her husband if the survey showed that the road was on their property. Petitioner never fulfilled those promises.

Years later in 1970, the Secretary of the Interior pledged to Respondent and her husband that a "cadastral survey" would be conducted to resolve the boundary dispute. Instead, Petitioner simply conducted a "dependent re-survey" of the area. The re-survey showed that the disputed property is actually Petitioner's

property. This re-survey, however, was not validated until 1980 when it was approved by Petitioner.[2]

Without notifying Respondent and her husband that the original survey, on which Bottini made misrepresentations and on which Respondent and her husband relied, was defective, Petitioner began treating the disputed property as its own. Respondent and her husband first learned of the re-survey results in 1983 when they observed Petitioner apparently trespassing and removing culverts from the disputed property.

Respondent and her husband then filed various lawsuits against Petitioner, including this one in 1988, to resolve the boundary dispute. Petitioner moved for dismissal in the district court, arguing that the action was time barred by the QTA because Respondent and her husband had constructive notice of Petitioner's claim more than twelve (12) years before the lawsuit. Petitioner further argued that equitable estoppel or tolling cannot be applied to the statute of limitation imposed by the QTA. Petitioner contended that, even if Petitioner misled Respondent and her husband to the extent required to justify application of equitable principles, Respondent and her husband could not maintain their meritorious claim because Petitioner is the government. The district court agreed.

Respondent and her husband appealed this open injustice to the Ninth Circuit, which reversed and remanded. *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995). The Ninth Circuit found that Respondent and her husband did not have

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2. In 1987, upon the protests of Respondent and her husband that the 1980 dependent re-survey results were defective, Petitioner confirmed the defectiveness, suspended the results, and authorized a "corrective dependent re-survey." The corrective re-survey was conducted in 1988 and was not approved until 1990, two years after this case was filed.

constructive notice of Petitioner's claim until 1980 when the re-survey was approved. *Id.* at 206-07. The Ninth Circuit found the district court erred in applying the "contours" doctrine established by *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980), because, unlike the deed in *Knapp*, there was no evidence in this case to support a claim that Respondent and her husband knew or should have known that Petitioner claimed the disputed property. *Fadem*, 52 F.3d at 207.

The Ninth Circuit also noted that the district court erred in refusing to apply equitable tolling because Petitioner had not rebutted the applicable presumption of equitable tolling established in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990). *Fadem*, 52 F.3d at 205-06.

Petitioner now asks this Court to exercise its certiorari jurisdiction on the issue of whether the QTA's statute of limitation is subject to equitable tolling. Petitioner asks the Court to reconsider the clear language of *Irwin* and rule that courts do not have the power to apply longstanding equitable principles in actions brought under the QTA.

REASONS FOR DENYING THE WRIT

This Court's exercise of certiorari jurisdiction is discretionary and depends on numerous factors other than the perceived correctness of the judgment the Court is asked to review. *Ross v. Moffitt*, 417 U.S. 600, 616-17, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974). This Court does not sit for the benefit of particular litigants. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 99 L. Ed. 897, 75 S. Ct. 614 (1954). A petition will only be granted for "compelling reasons." Rules of the Supreme Court, Rule 10 (Rev. 1995). A petition is "rarely granted" when the asserted error consists of the "misapplication of a properly stated rule of law." *Id.* The principal purpose of certiorari jurisdiction

is to resolve conflicts among the courts of appeals concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 114 L. Ed. 2d 385, 111 S. Ct. 1854 (1991).

A. The Inapplicability Of The *Knapp* "Contours" Doctrine, Not The Applicability Of Equitable Tolling, Was The Basis For The Ninth Circuit's Decision.

The Court should not grant the petition because the equitable tolling issue was not dispositive in *Fadem*. The Ninth Circuit found that Respondent and her husband did not have constructive notice until the re-survey results were approved in 1980. *Fadem*, 52 F.3d at 206-07. The Ninth Circuit found the *Knapp* "contours" doctrine inapplicable because there was no evidence to support Respondent and her husband knew or should have known of Petitioner's claim under the circumstances. *Fadem*, 52 F.3d at 207.

Given that Respondent and her husband filed the action in 1988, well within the QTA's twelve (12) year period to file an action, resolution of whether equitable tolling could be applied was not necessary to the Ninth Circuit's decision. The Ninth Circuit's conclusion, based on *Irwin*, that equitable tolling could apply was essentially dicta. *Wainwright v. Witt*, 469 U.S. 412, 422, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985).

Petitioner does not ask this Court to review the Ninth Circuit's holding based on the inapplicability of the *Knapp* doctrine nor the Ninth Circuit's finding of constructive notice in 1980. A determination by this Court on whether equitable tolling can be applied to the QTA is unnecessary to this case and will not be dispositive of it. Petitioner is, therefore, essentially requesting an advisory opinion from this Court. The issue does not present a "compelling reason" to exercise certiorari jurisdiction.

B. No Conflict Among The Circuits Exists As To This Issue.

Petitioner admits that there are no other courts of appeal that have considered whether equitable tolling can be applied to the QTA. Petitioner merely states that the issue is "similar" to the issue of whether equitable tolling may be applied in tax refund cases, on which a circuit conflict exists. *Compare Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995) (tolling allowed) *with Webb v. United States*, 66 F.3d 691 (4th Cir. 1995) (no tolling allowed); *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) (same).

Petitioner's reliance on the similarity of issues is misplaced, and the apparent similarity of issues is illusory. No courts of appeal have held that *Irwin*'s equitable tolling presumption cannot be applied to the QTA or that the language of the QTA rebuts the *Irwin* presumption.[3] *Webb*, while holding that no tolling is allowed in tax refund cases, found no conflict with cases in other contexts which found that tolling is allowed. *Webb*, 66 F.3d at 696. *Webb* expressly distinguished the cases in other contexts, finding that "[c]onsistent with this broad language [in *Irwin*], *Irwin*'s 'rebuttable presumption of equitable tolling' has since been applied in cases against the federal government other than those arising under Title VII." *Id., citing among others, Fadem*, 52 F.3d at 205-206. *Webb* further noted that "[c]ourts are divided, however, as to whether the rebuttable presumption of equitable tolling applies in tax refund cases." *Webb*, 66 F.3d at 696.

While *Brockamp*, holding that tolling is allowed in tax

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3. Petitioner also relies on *Block v. North Dakota*, 461 U.S. 273, 75 L. Ed. 2d 840, 103 S. Ct. 1811 (1983) and *United States v. Mottaz*, 476 U.S. 834, 90 L. Ed. 2d 841, 106 S. Ct. 2224 (1986) in arguing that *Fadem* is in conflict with this Court's prior decisions. As discussed *infra* Section D.2., however, neither *Block* nor *Mottaz* addressed these issues and they both preceded *Irwin*.

refund cases, directly conflicts with *Webb* and *Oropallo*, that conflict is irrelevant in determining whether there is a circuit conflict in QTA cases. *Webb* recognized this conclusion; the Court should recognize it here.

The "principal purpose" of certiorari jurisdiction is, therefore, not implicated in this case. The mere conceptual similarity of the issues does not present a "compelling reason" for certiorari jurisdiction. Resolution of this quiet title action brought by Respondent and her husband should not be delayed by holding the instant petition until a potential resolution of the circuit conflict in the tax refund cases.

C. The Issue Does Not Otherwise Present A Compelling Federal Question.

Petitioner asserts that certiorari jurisdiction is warranted because the QTA is addressed to an important aspect of the sovereignty of the United States. Petitioner, however, engages in faulty reasoning in analogizing the sovereign interests of the government in taxation to its interests in property ownership disputes.

Contrary to Petitioner's suggestions, the issue in this case has nothing to do with the Constitutional powers of Congress in controlling public lands. The issue in this case has nothing to do with Congress' "sovereign rights" to grant public lands for specific uses nor with Congress' "sovereign rights" to regulate uses on public lands.

The issue here only relates to whether courts may apply equitable principles to the QTA's statute of limitations. Quiet title actions in equity have long been used to enforce the "private rights" of property owners in boundary disputes. The nature of this case is wholly inapposite to the tax refund cases, which are

not "even comparable to suits that can be brought against private litigants." *Webb*, 66 F.3d at 697. As found determinative in *Webb*, taxes are "different" because they are the "life-blood of government." *Id.* at 697-98.

Unlike the tax refund cases, "comparable suits" to quiet title between private litigants have long been in existence. The "difference" relied on in the tax refund cases is not the fact that one of the parties is the government. The tax refund cases implicate the government's paramount sovereign right to tax its citizens in order to remain operational. Petitioner cannot escape the fundamental notion that property boundary disputes, in contrast to the tax refund cases, are in the nature of private rights.

Because the interests at stake here are in the nature of private rights, the issue does not present a "compelling reason" for the exercise of certiorari. If Petitioner's assertion were accepted, every federal question would be worthy of certiorari because, regardless of the nature of the action, Congress always acts under the Constitution. No case could apply equitable tolling against the government because the government always exercises a "sovereign right" when it acts. These conclusions were clearly rejected by this Court in *Irwin*.

D. This Court Should Not Review *Irwin*.

Petitioner asserts that review of *Irwin* is necessary because *Irwin*'s application to the QTA will expose Petitioner to stale claims concerning vast holdings of public lands in the Ninth Circuit. None of Petitioner's assertions, however, justify a review of the general rule created by *Irwin*.

1. This Court Previously Considered And Disposed Of Petitioner's Contentions In Irwin.

Six years ago in *Irwin*, this Court clearly resolved the issue of whether equitable tolling is presumptively applicable and when that presumption is rebutted. Chief Justice Rehnquist, delivering the opinion of the Court, stated:

> [A] continuing effort on our part to decide each case on an ad hoc basis, as we have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. **We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government. . . . Once Congress has made [a waiver of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable in private suits, amounts to little, if any, broadening of the congressional waiver.** Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. **We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.**

Irwin, 498 U.S. at 95-6. (Emphasis added.)

Contrary to Petitioner's assertions, this Court neither required that the federal statute in question also create a private right of action to apply the rebuttable presumption nor found that the presumption would be rebutted where no private right of action exists. Holding expressly that it was creating a "general rule to govern the applicability of equitable tolling in suits against the Government" (*Id.* at 95), the Court did not impose the limits on its holding that Petitioner now asserts.

2. Block and Mottaz Are Neither Controlling Nor Persuasive.

This Court did not previously consider these issues in *Block* and *Mottaz*. In *Block*, the Court considered whether Congress intended to exempt the states from the QTA and whether an officer suit could be maintained under the QTA. *Block*, 461 U.S. at 280. In *Mottaz*, the Court considered whether Congress intended to exempt Indians from the QTA and its statute of limitations. *Mottaz*, 476 U.S. at 841. Neither case expressly considered whether equitable tolling could be applied against the government.

To the extent that *Block* and *Mottaz* contain any language supportive of Petitioner's assertions, that language can only be considered dicta and clearly has no continuing validity after *Irwin*. This conclusion is confirmed by this Court's reliance in *Block* and *Mottaz* on *Soriano v. United States*, 352 U.S. 270, 1 L. Ed. 2d 306, 77 S. Ct 269 (1957). *Block*, 461 U.S. at 287; *Mottaz*, 476 U.S. at 841-42. In *Irwin*, this Court expressly considered the impact of *Soriano* and concluded that *Soriano* did not preclude the equitable tolling presumption. *Irwin*, 498 U.S. at 94-5. The Court found that despite the stringent language in *Soriano*, the Court would nevertheless apply the presumption. *Irwin*, 498 U.S. at 94-5. This Court expressly rejected Justice White's dissenting opinion that *Soriano* did preclude application of the presumption. *Irwin*, 498 U.S. at 94-5.

3. Webb Makes The Distinction Between Tax Refund Cases And The QTA Clear.

Webb's analysis in considering yet rejecting *Irwin*'s rebuttable presumption in tax refund cases is instructive in refuting Petitioner's contentions in this case. *Webb* noted the key rationale for *Irwin* is that the government should be treated in the same manner as a private defendant. *Webb*, 66 F.3d at 697. *Webb* recognized and agreed with other courts, including the Ninth Circuit in *Fadem*, that *Irwin*'s rationale justified its application in cases other than tax refund cases. *Webb*, 66 F.3d at 697, *citing among others Fadem*, 52 F.3d at 205-06.

Webb distinguished the other cases applying *Irwin*'s presumption on several grounds. *Webb* found that taxation is a paramount "sovereign right," not in the "nature of private rights." *Id.* at 697-98. *Webb* also found that tax refund cases are not "comparable" to suits between private litigants. *Id.* at 697. *Webb* further found that *United States v. Dalm*, 494 U.S. 596, 108 L. Ed. 2d 548, 110 S. Ct. 1361 (1990), rendered nine months prior to *Irwin* but unaddressed by *Irwin*, was a strong indication by the Court that *Irwin*'s presumption did not displace the strict time limits of the Internal Revenue Code ("IRC"). *Webb*, 66 F.3d at 698.

Moreover, citing *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), which relied heavily on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), *Webb* agreed with *Oropallo* and found that the double threshold statutory scheme of the relevant IRC provisions was akin to the statute of repose found by *Lampf* in the Securities Exchange Act of 1934's one and three-year statutory scheme and not akin to a statute of limitation. *Webb*, 66 F.3d at 699-700. *Webb* concluded that this distinction between a statute of repose and a statute of limitation was crucial in not

applying *Irwin* because the statute evinced an absolute "outside limit," rebutting effectively *Irwin*'s presumption applied to statutes of limitations.[4]

Unlike the statutory schemes at issue in *Lampf* and *Webb*, Congress did not evince an intent to create a statute of repose in the QTA's statutory scheme. Congress created a typical single threshold scheme triggered not by the time the government claimed ownership but by the time the disputing property owner "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). Even if this language is considered more stringent than that in *Irwin*, this language plainly does not "manifest a different [C]ongressional intent with respect to equitable tolling" necessary to rebut the presumption. *Irwin*, 498 U.S. at 95.[5]

Petitioner's attempts to discern a statute of repose in the legislative history of the QTA is unavailing. The plain meaning of the statute does not evince a Congressional intent to create a statute of repose. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985), *quoting Park'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985)(the Court begins with the language employed by Congress and assumes that the ordinary meaning of that language accurately expresses the legislative purpose).

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4. *Webb* further noted the significance of the distinction between a statute of repose and statute of limitation. A statute of limitation is a procedural device that operates as a defense to limit the remedy available from an existing cause of action, whereas a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* at 700-01.

5. The Court expressly considered the stringent language in *Soriano*, but found nevertheless that it did not "manifest a different congressional intent" to avoid the presumption. *Irwin*, 498 U.S. at 95.

Webb's reasoning and conclusions demonstrate that certiorari should not be granted here. A paramount "sovereign right," such as taxation, is not implicated. This QTA action is "comparable" to an action between private litigants to enforce private rights. Congress did not create a statute of repose in the QTA's statutory scheme. As noted by the Ninth Circuit, the QTA is a typical statute subject to *Irwin*'s presumption. No courts have disagreed with the Ninth Circuit, and, based on *Webb*, there is no reason to believe that any courts will disagree if this issue arises again.

4. Petitioner's Concern That Irwin's Application Will Unduly Expose Petitioner To Stale Claims Is Unnecessarily Alarmist.

Petitioner wholly fails to consider *Irwin*'s recognition of judicial safeguards in applying equitable principles. *Irwin*, 498 U.S. at 96. Federal courts typically extend equitable relief only sparingly, and they do not extend relief to the "garden variety claim of excusable neglect." *Id.* This Court, contrary to Petitioner, has recognized that judicial restraint can be trusted to avert overwhelming litigation against Petitioner on equitable principles. *Id.*[6]

There is no substantial reason to believe that the Ninth Circuit's decision in this case will unduly expose Petitioner to "stale claims concerning the vast holdings of public lands in the Ninth Circuit." The courts can be trusted to continue their sparing application of equitable principles, including equitable tolling, to protect Petitioner from stale claims.

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6. Notably, in *Git v. Dept. of the Treasury*, 1996 U.S. App. LEXIS 86 (8th Cir. Jan. 4, 1996), the Eighth Circuit had no difficulty in finding that, even if it were to apply tolling principles under *Irwin* to the tax refund case before it, the party seeking to benefit did not provide sufficient grounds to justify equitable tolling against the government. *Id.* at 3.

CONCLUSION

For all these reasons, Respondent respectfully requests that this Court deny the petition. Respondent further requests that this Court not hold the petition pending potential petitions in *Brockamp* or *Webb*. Regardless of whether this Court decides to review either or both of these tax refund cases and regardless of any decision by the Court in those cases, the Ninth Circuit's decision in this case remains unaffected. The Ninth Circuit's holding was based on its finding that the *Knapp* "contours" doctrine was inapplicable, and that, therefore, Respondent's action was brought well within the QTA's statute of limitations. Petitioner does not seek review of this dispositive determination.

Moreover, *Fadem* neither conflicts with any other circuits nor with any prior decisions of this Court. *Irwin* clearly applies to the QTA, and this is made clear by *Webb*. Petitioner's skepticism of judicial restraint should not be the basis for exercising this Court's certiorari jurisdiction.

Respectfully submitted,

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No. 95-1028

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FADEM AND MARY O. FADEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent argues (Br. in Opp. 5) that the court of appeals' decision was predicated entirely on the application of the "contours doctrine" (which concerns the scope of the claim of which respondent had notice), and that the court's discussion of equitable tolling was "essentially dicta." That contention is incorrect. Applying the contours doctrine, the court of appeals concluded that the Fadems could not be charged with notice of the government's claim to the portion of the disputed property that lies west of the reservoir. See Pet. App. 4a & n.2, 11a-12a. The contours doctrine played no part, however, in the court of appeals' resolution of the case with respect to the property *east* of the reservoir. The court distinguished between the two parts of the property, and

stated that the Fadems knew "that the Government claimed title to the eastern section." *Id.* at 11a-12a. The court also remanded the case to the district court for consideration of equitable tolling on the facts of this case. *Id.* at 9a-10a. Only equitable tolling could render respondent's claim to the eastern section timely. The issue of equitable tolling is therefore squarely presented in this case.

Although we believe that the court's application of the contours doctrine is incorrect, we have not sought review of that aspect of its decision because the error may be confined to the facts of this case. The court's ruling on equitable tolling, however, has broad implications for the management of federal lands. Those implications are particularly significant in the Ninth Circuit, where the United States has very extensive land holdings, the title to which may be unsettled as a result of the decision below. Although, as respondent notes (Br. in Opp. 6-7), no other court of appeals has considered, since this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), the precise question whether equitable tolling applies to the statute of limitations in the Quiet Title Act (QTA), 28 U.S.C. 2409a(g), the effect of the decision below in the Ninth Circuit alone would warrant review by this Court.

2. Contrary to respondent's suggestion (Br. in Opp. 8-10), we do not ask the Court to reconsider the holding of *Irwin*. The issue in this case is the application of *Irwin*, as is the issue in *United States* v. *Brockamp*, petition for cert. pending, No. 95-1225 (filed Jan. 31, 1996), and *Webb* v. *United States*, petition for cert. pending, No. 95-1360 (filed Feb. 23, 1996). If the Court grants review in *Brockamp* or *Webb*, it is likely to clarify the circumstances in

which equitable tolling should be applied to statutes of limitations in suits against the government. Because the Court's resolution of that issue may determine whether equitable tolling is available in actions brought under the QTA, this case should be held for the disposition of *Brockamp* and *Webb*.

a. Respondent argues that, under *Irwin*, equitable tolling must be applied (absent congressional direction to the contrary) to all actions against the government that are comparable to actions that may be brought against private litigants. See Br. in Opp. 13. *Irwin*, however, involved a cause of action (under Title VII of the Civil Rights Act of 1964) that Congress itself has made applicable to both the government and private employers, not a cause of action that is merely "comparable" to one that might be asserted against private litigants under some other body of law. As the Court noted in *Irwin*, it had already held that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." 498 U.S. at 95. In that context, the Court concluded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver" of sovereign immunity. *Ibid.* The Court also observed in that context that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*

It is true that, under state law, quiet title actions, unlike tax refund suits, may be brought against private parties. But it is also true that, in the Act under consideration here, Congress has provided only for suits against the federal government, and has not

legislated broadly on the subject of land disputes among private parties. Moreover, although Congress could have "adopt[ed] state law in its entirety, thereby placing the United States on the same footing as any private litigant," it chose not to do so, largely because "the wide differences in State statutory and decisional law on this subject [made] this an impractical alternative." See H.R. Rep. No. 1559, 92d Cong., 2d Sess. 5-6 (1972) (letter from Attorney General to Speaker of the House of Representatives). In particular, as the Attorney General pointed out when the QTA was enacted, under state law "there is an immense variation with respect to the period of limitation on bringing suits." *Id.* at 10.* The 12-year limitation period in the QTA supplies a distinct federal rule for suits against the United States.

This case therefore presents the question whether it would be a "realistic assessment of legislative intent" to extend the rebuttable presumption in favor of equitable tolling, articulated in *Irwin*, to a statutory cause of action that runs *only* against the government—or whether that rebuttable presumption is limited to causes of action that may be asserted against both private and governmental litigants, and that must in many respects be construed without regard to the identity of the particular defendant. This Court could decide in *Brockamp* or *Webb* that the *Irwin* rule applies only to causes of action of the

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* The Attorney General also noted variations in state law as to whether a plaintiff pursuing a quiet title action must be in possession of the property. H.R. Rep. No. 1559, *supra*, at 10; see also *id.* at 6 (noting traditional English practice requiring possession by plaintiff). The QTA does not require the plaintiff to be in possession of the disputed property. See *id.* at 10.

latter kind. In that event, the decision below would be incorrect as a matter of law. The petition in this case should therefore be held for the disposition of *Brockamp* and *Webb*.

b. In addition, as we note in the petition (at 10-12), the *Irwin* rule, even if applicable to all causes of action against the government, is only a rebuttable presumption, and it must give way to a more definite expression of congressional intent about equitable tolling. See *Irwin*, 498 U.S. at 96 ("Congress, of course, may provide otherwise if it wishes to do so."). An issue in this case, as in *Brockamp* and *Webb*, is how the courts should determine whether Congress has "provide[d] otherwise."

We do not argue that the text and structure of the QTA compel the conclusion that the 12-year statute of limitations is a "statute of repose" (see Br. in Opp. 12). We do argue that equitable tolling is nonetheless inconsistent with the QTA's text and structure, because the QTA's 12-year limitation period is "jurisdictional" in nature (*United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983)), and because the QTA's cause of action accrues when the plaintiff "knew or should have known" of the government's claim. See Pet. 11-12.

The "should have known" language provides plaintiffs with protection against unfair prejudice in cases of misrepresentation by the government about the nature of its claim. In such a case, the limitation period would not begin to run until the plaintiff became aware of sufficient facts to dispel the effect of the misrepresentation, such that the plaintiff should have known of the government's claim. It is unlikely that Congress *also* intended for the limitation period to be subject to equitable tolling in such a case. That

interpretation would mean, in effect, that there is no statute of limitations at all in cases involving government misrepresentation. That conclusion is at odds with the text of Section 2409a(g), which imposes a 12-year limitation period, even for causes of action accruing when the plaintiff "should have known" of the government's claim. It is also at odds with Congress's intent to impose a reasonable limit on the prosecution of stale land claims against the United States. That was the point of greatest controversy during the passage of the QTA, and it was resolved by adoption of the 12-year limitation period. See H.R. Rep. No. 1559, *supra*, at 5.

* * * * *

For the foregoing reasons, and for the additional reasons set forth in the petition, the petition for a writ of certiorari should be held pending the final disposition of *United States* v. *Brockamp*, petition for cert. pending, No. 95-1225 (filed Jan. 31, 1996), and *Webb* v. *United States*, petition for cert. pending, No. 95-1360 (filed Feb. 23, 1996), and then disposed of as appropriate in light of the disposition of those cases.

Respectfully submitted.

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Solicitor General

MARCH 1996